

***United States Court of Appeals
for the Second Circuit***



REPLY BRIEF

77-4162

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CROSS-SOUND FERRY SERVICES, INC.,)
)
 Petitioner,)
)
 v.) No. 77-4162
)
 THE UNITED STATES OF AMERICA and) (Petition for Review Of
 INTERSTATE COMMERCE COMMISSION,) A Decision Of The Inter-
) state Commerce Commission)
 Respondents.)

REPLY BRIEF OF PETITIONER AND
INCORPORATED VILLAGE OF GREENPORT, THE
BRIDGEPORT AND PORT JEFFERSON STEAMBOAT
COMPANY AND SHELTER ISLAND AND GREENPORT FERRY CO.

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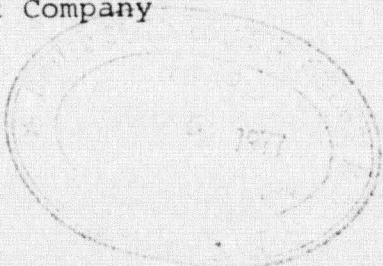


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Petitioner Cross-Sound Ferry Services ("Cross-Sound") and intervenors Incorporated Village of Greenport ("Greenport"), The Bridgeport and Port Jefferson Steamboat Company ("B. & FJ") and Shelter Island and Greenport Ferry Co. (SIGF") hereby submit this brief in reply to that of respondents Interstate Commerce Commission ("ICC") and the United States of America,* / and that of their supporting intervenor, Mascony Transport and Ferry Service, Inc. ("Mascony").

REPLY ARGUMENT

- A. The Selective Updating Of The Record By The ICC Violated Due Process And Was Fundamentally Unfair And An Abuse Of Discretion.

Both the ICC and intervenor Mascony offer at best post hac rationalizations for the unfair processing of this case by the agency. Neither justify what was obviously an effort to "pick and choose" what evidence would be considered without cross-examination long after close of the hearings. The obvious intent was to afford Mascony endless latitude to cure a manifest failure to meet its statutory burden of proof under section 309(c) of the Act, while denying protestant NLFL and its successor in interest, Cross-Sound,

* / The ICC and the United States filed a joint brief. For simplicity respondents will be referred to herein as "the ICC".

the right to supplement the record as to their version of "changed circumstances" including evidence of a sharp decline in vehicular traffic since close of the hearing record.

The sequence of events is critical to an understanding of the manifest bias and fundamental unfairness which characterize Division 1's disposition of this case. The last day of hearings was February 20, 1974 and the judge's decision denying the application was issued four months later in June. Recognizing its failure to make a case before the hearing judge, on August 14, 1974 applicant Mascony sought reopening of the record, without hearing or cross-examination, for receipt of additional evidence of "safety precautions and environmental impact."*/ J. A. Doc. 207, p. 26. In their reply**/ in opposition to reopening, NLFL and B & PJ forewarned the Division that to allow such evidence long after close of the record and without cross-examination and

*/ Applicant also submitted exceptions alleging, inter alia, that the judge erred in not making a threshold environmental determination.

**/ These protestants also replied to each exception and supported the ultimate conclusion of the initial decision denying the application.

rebuttal would be a denial of fundamental fairness.*/

Division 1 deferred any action for over a year and in October, 1975, it committed prejudicial error by receiving in evidence Mascony's late submitted material as reflecting "changed circumstances".**/ J.A. Doc. 249. The October order described the case as "unopposed at this time" because Cross-Sound had not yet intervened as successor in interest to NLFL. Since the case was obviously contested,***/ the Division's incorrect finding to the contrary revealed its shocking bias in favor of Mascony which was to permeate all future steps in the proceeding. The Division was looking

*/ The reply objected vigorously to "...receipt of any of the material tendered by applicant with its exceptions without affording the opportunity to test it under cross-examination and to rebut those facts which these protestants know to be inaccurate..." J.A. Doc. 221, pp. 26-7.

*/ This order also received in the record unverified, prejudicial material applicant had earlier submitted with its application for temporary authority. Such material normally is not considered in adjudication proceedings with respect to permanent applications for operating rights.

*/ The Division ignored a pending transfer of NLFL's operating authority to Cross-Sound. NLFL had not withdrawn its opposition, and as of October, 1975, the ICC itself had not issued a certificate to Cross-Sound evidencing the transfer of authority which had been consummated on May 23, 1975. On October 29, Cross-Sound moved for substitution as successor protestant in interest to NLFL. J.A. Doc. 252. In making its improper finding that the case was "unopposed at this time", Division 1 also ignored the continuing participation of other protestants including B & PJ, East End Supply Company, SIGF and Greenport.

for any conceivable "boot-strap" to rationalize its denial of NLFL/Cross-Sound's right to cross-examination and rebuttal on key issues affecting operating feasibility and environmental considerations.

Indicating a belatedly awakened interest in NEPA, the Division also*/ ordered "an evaluation of the environmental effects of the proposed service." This came approximately sixteen months after the hearing officer had found "...it is not possible on this record to make an appropriate determination as to whether or not granting of this application would be a major federal action..." within the meaning of NEPA and, if so, what environmental impact would result.

Cross-Sound and B & PJ petitioned for reconsideration of the October, 1975 order and repeated their requests for cross-examination and rebuttal. J.A. Doc. 282, pp. 8-13. Also included was a request in the alternative for reopening to allow protestants the opportunity to submit

*/ The ICC's brief erroneously suggests the first reopening was motivated solely by a late recognition of need for "detailed environmental analysis." In fact, the order went much further. It received prejudicial post-hearing evidence from Mascony and denied protestants any right of cross-examination and rebuttal.

their evidence of "changed circumstances".

In November, 1976, the majority of Division 1 of the ICC (two Commissioners) issued its decision granting a "conditional" certificate and denying petitioners' second request */ for cross-examination on applicant's late filed evidence. Although admitting Cross-Sound's evidence "might provide assistance in making an optimum decision", the two Commissioners cited delays, for which the Commission itself was solely responsible, and refused to reopen the record for further hearing. This action was taken with some reluctance by the majority and was vehemently opposed by the dissenting Commissioner. **/

Absolutely no suggestion was made in the majority decision that the refusal to reopen was based on a finding that the application would be granted on competitive grounds irrespective of Cross-Sound's service capabilities or traffic consideration, on which issues Cross-Sound had repeatedly

*/ That request was in the petition of November 21, 1975, J.A. Doc. 282.

**/ Commissioner Murphy, then Chairman of Division 1, dissented vigorously on nearly all procedural and substantive issues.

requested the right to supplement the record prior to decision. Division 1, having created all of the delay,*/ was abusing Cross-Sound's rights while expanding those of Mascony, the applicant. It obviously was seeking an "optimum" decision on the applicant's case to the severe prejudice of Cross-Sound and the other protestants.

Had Cross-Sound and other protestants been afforded the right to submit their version of "changed circumstances", the result could well have been denial of the application.

There had been a dramatic reduction in traffic as a result of the energy crisis which occurred in 1974 just after the close of the record. It could well have caused an unbiased Commission to conclude that there was no longer sufficient traffic to sustain competitive operations and that authorization of a duplicate service under such conditions would probably result in the elimination of any service as both the existing carrier and the new carrier would be unable to generate sufficient revenue to sustain operations.

*/ The Division delayed longer in deciding that it could not accede to the request of Cross-Sound and B & PJ to reopen the record than it took the Administrative Law Judge to develop the basic record in the first instance. The concern in the Division's decision about additional delay has a hollow ring.

Significant qualitative and quantitative improvements had been instituted by the newly established service of Cross-Sound. As stressed by the dissenting Commissioner, "evidence of existing carriers is to be considered in determining whether an application should be granted", and the ICC has frequently "...given due recognition of the existence of newly established services in denying an application..." J.A. Doc. 324, pp. 73, 75.

However, the majority of Division 1 refused to consider facts pertinent to existing service as of the time of "changed circumstances" while accepting applicant Mascony's evidence of changed conditions affecting its proposal. This unfairly disparate treatment of protestants and applicant cannot now be rationalized by asserting, as does the ICC, that need was not "under consideration". Issues as to need, fitness, and environment were directly at issue and closely intertwined throughout this case.

Cross-Sound's petitions to be substituted as a party and to reopen the record were submitted a year prior to the decision. The Division's majority delayed acting until its decision was served when it permitted Cross-Sound's substitution as a protestant but simultaneously denied it any opportunity to submit evidence. Such treatment of a vitally affected party caused dissenting Commissioner Murphy to observe:

"If this is due process, then a new explanation of the term is necessary." J.A. Doc. 324, p. 74, note 3.

The dissenting opinion also rejected the majority's reliance on ICC v. Jersey City, 322 U.S. 503. More than adequate time had already transpired in which to allow Cross-Sound to submit evidence on its operations:

"This proceeding, far from being at a stage where further hearing might be inappropriate, was actually reopened for, among other purposes, the preparation of draft and final environmental impact statements. In fact, a draft environmental impact statement herein was served on February 3, 1976, with the final statement served on June 11, 1976. Thus, it is clear that the interval, November 21, 1975-June 11, 1976, a period of over 6 months, was adequate enough to permit Cross-Sound to submit evidence on its operations, with applicant and others allowed to reply. In these circumstances, there were no reasonable grounds to deny Cross-Sound's request and failure to honor that request while affording applicant the opportunity to update its own evidence is a serious departure from due process of law." J.A. Doc. 324, pp. 73-74.

That such serious objections to its procedures were voiced by its senior member is dramatic proof of the prejudicial mishandling of this case by Division 1 of the Commission.

The November 1976 decision was not the end to the prejudicial processing of this case by Division 1. Cross-Sound continued its objection to the Division's arbitrary denial of due process by filing a petition for reconsideration

which again alleged, inter alia, that significant changes in circumstances had occurred, including operating and environmental matters affecting existing service and the Mascony proposal.*/ A groundswell of new opposition to the proposal had developed, and six parties representing affected community interests sought intervention and reconsideration. However, in its order served April 8, 1977, Division 1 refused all requests for reopening of the record but allowed Mascony to submit "additional evidence... regarding docking, staging and loading sites..." J.A. Doc. 356. This was a classic example of fundamental unfairness.

Notwithstanding the fact that in November 1976 "the time already consumed" prevented reopening of the record to receive evidence of changed circumstances which Cross-Sound had requested an opportunity to submit a year earlier, the Division, in April of 1977, found itself able to reopen the record for Mascony to submit still more evidence to buttress its case. J.A. Doc. 356, p. 2.

The ICC's discretion to reopen proceedings is limited

*/ Contrary to the ICC's and Mascony's efforts to re-characterize the events of record, these matters included more than service considerations, which were clearly relevant. Cross-Sound also described "many additional impediments to feasible operation by Mascony that have come into being" and adverse environmental impact on affected communities. J.A. Doc. 345, pp. 12-14.

by considerations of basic fairness. Delta Airlines, Inc. v. CAB, 561 F.2d 293, 312 (D.C. Cir. 1977); Atchison, T. & S.F. Ry. v. United States, 284 U.S. 248, 260 (1932). Any impartial analysis of the action of Division 1 in this case compellingly leads to the conclusion that its treatment of petitioners was grossly unfair.

Mascony claims Delta is distinguishable since in that case "the CAB itself selected facts to update the record." Mascony Brief at p. 41. But here the ICC did just that; it selected evidentiary facts that it wanted to buttress a plainly deficient record necessary to support a grant of authority, but simultaneously refused to receive evidence tendered by Cross-Sound and others supporting their contentions. Moreover, the last reopening, limited to Mascony's plan of operations, was sua sponte.*/

Where an agency chooses to reopen and update an administrative record, as was done here twice, it must do so "in a manner fair to all concerned." Delta Airlines, Inc. v. CAB, 561 F. 2d 293, 312 (D. C. Cir. 1977). Repeated refusals to afford Cross-Sound the opportunity to submit

*/ The ICC's brief (p. 37) seeks to discount the April order as only "necessitated by the Commission's continuing duty to monitor applicants' fitness and willingness to provide service." Nowhere in the Commission's order is there the slightest indication of such a purpose. J.A. Doc. 356. Rather, it is a product of the imagination of ICC counsel.

additional direct evidence was especially unfair since:

"Under certain circumstances, especially where the delay is long, the case close, and the intervening events significant, participation by interested parties may well be indispensable."
Ibid.

This was just such a case.

The ICC's brief characterizes the second reopening in April of 1977, as merely a monitoring step to "apprise" the Division of Mascony's efforts to make shore and harbor preparations. This reopening was "not for the benefit of Mascony." (ICC Brief, pp. 39-40) The reopening in 1977 was compelled by Division 1's recognition that Mascony had shown no realistic prospect of being able to operate. By that time Cross-Sound had made clear to the Division that its grossly unfair treatment of the case was going to be the subject of judicial scrutiny. Therefore, if the predetermined result was to be even colorably supportable, the Division had to give Mascony another opportunity to repair its fatally defective case.*/ The final reopening was for the exclusive benefit of Mascony, and sharply contrasts with the Division's inconsistent treatment of protestants.**/

*/ Significantly, when Mascony submitted its evidence in response to that reopening, yet a third plan of operation emerged.

**/ Significantly, no effort is made in that order to reconcile the reopening that was there ordered with the finding, made in the November, 1976 order (J.A., Doc. 324), that the length of time already consumed prohibited a reopening of the record for the submission of protestants' evidence.

At the time it occurred, this reopening was not justified by any stated purpose of apprising the ICC of the "continuing efforts to make shore and harbor preparations", as now alleged in the ICC's brief. The fact is that the order so reopening makes no mention of any ground for the reopening. J.A. Doc. 356. Thus this argument is simply another post hac rationalization by counsel for the ICC's continuously unfair compilation of the record herein. See, Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962).

The pattern here of prejudicial reopenings, harmful to protestants while beneficial to the applicant, brings this case clearly within the exceptions to the doctrine of agency discretion. The selective opening of the record for Mascony while shutting it for Cross-Sound as a competitor is reversible error.

B. Arguments By The ICC And Mascony Do Not Cure The Prejudicial Error Caused By The ICC's Failure To Provide For Cross-Examination On The EIS.

Both Mascony and ICC argue that Cross-Sound and the other protestants had no right to a hearing and cross-examination on the environmental impact statement ("EIS") relied upon by the Commission in its decision. They assert NEPA requires no hearing and thus none had to be afforded

protestants.

While the text of NEPA does not require agency hearings, this Circuit has observed that even in rule making cases cross-examination may be essential as a "powerful procedural device through which to locate factual truth" where the environmental inquiry is important and crucial issues are involved. In such cases, cross-examination on environmental issues is necessary to afford interested parties the right to participate meaningfully. Natural Resources Defense Council v. Nuclear Regulatory Commission, 539 F.2d 824, 838-839 (2d Cir. 1976).

Here, as opposed to proposing rules of broad general impact, the ICC was adjudicating an application for new common carrier operations which would have a specific, direct impact on individual private and public parties.*/
At issue were critical and serious questions of environmental impact, including inter alia, alleged fuel savings to be realized, traffic congestion at the Port of Greenport, hazards to safety at Mascony's New London terminal, effect

*/ Petitioner Cross-Sound's economic interest does not deprive it of the right to seek proper enforcement of NEPA as a private attorney general. Maine Central R.R. v. ICC, 410 F. Supp. 653, 655 (D.D.C. 1976). Moreover, Greenport and SIGF, intervenors in support of petitioner, are parties facing direct environmental injury as a result of the proposal. Their environmental interests are described in the opening brief in behalf of petitioner and supporting intervenors at pages 13-14. Finally, the Commission's revised regulations on NEPA afford "any party" the right to cross-examine on the EIS. 49 C.F.R. §1108.17(b).

upon recreational boating within Greenport's harbor, as well as the ability of the applicant to minimize the adverse environmental consequences of its proposed operation.

The EIS became evidence in this case and was so considered by the Division in determining whether or not to grant the application. It is fundamental that in adjudicatory licensing proceedings, the parties have a right to confrontation and cross-examination on material facts.

National Trailer Convoy, Inc. v. United States, 293 F. Supp. 634 (N.D. Okla. 1968) (three-judge court); Garvey v. Freeman, 397 F. 2d 600 (10th Cir. 1968). In this case, cross-examination in a reopened hearing on the EIS was essential in order to afford protestants the right to elicit "... a full and true disclosure of the facts." 5 U.S.C. §556(d).

The ICC admits in its brief (pp. 17-18) that the EIS was a product of numerous ex parte investigations by the staff, including on-site inspections at Greenport and New London. The only way to assure that such evidence as compiled, and ultimately relied upon by the Division, was full, complete, and accurate, was to allow protestants the right

to probe and test such evidence through cross-examination.

The opportunity afforded protestants to submit comments on the draft EIS is certainly no substitute for the right of confrontation and cross-examination on the sources of the inaccurate information included in the statement. The Administrative Procedure Act is clear in affording a party both the right to present its case through its own evidence, and rebuttal evidence, and the right to cross-examination.

5 U.S.C. §556(d)

The ICC also argues (brief, p. 25) that the parties to this case had a full opportunity to comment on the final EIS once prepared. This is a misrepresentation. No opportunity to comment on the final EIS was granted any party.*/ Compare the Notice to the Parties preceding the draft EIS (J.A., Doc. 294) with that attached to the final EIS (J.A., Doc. 315).

Neither the ICC nor Mascony can deny that Division 1 considered environmental issues to be highly significant

*/ The EIS was not subject to reconsideration under Rule 101(2) of the ICC's rules of practice. The EIS was not a "decision, order or requirement" but evidence received by the ICC, relied upon, and attached as an appendix to the printed decision. J.A. Doc. 324, p. 62. It was presented as an evidentiary fait accompli.

in this proceeding. Before making specific environmental findings, the majority observed:

"The Commission's environmental impact statement raises serious questions as to the effect the proposed operation would have on the environment."

Having weighed specific environmental consequences, subject of the EIS, the Division concluded:

"...We conclude that the proposed operation would not have such a deleterious effect on the environment as to warrant denial of the application." J.A. Doc. 324, p. 70.

Had protestants been afforded the right to confront by hearing and cross-examination the sources of information used in the EIS, protestants could have demonstrated that the application should have been denied on the ground that the adverse effects on the environment more than outweighed any other countervailing considerations.

For example, the only positive environmental impact found by the Division in its November decision was that fuel savings "...projected to be as much as 600,000 gallons annually...could be significant." J.A. Doc. 324, p. 70. The source of the evidence on fuel savings was the EIS. J.A. Doc. 324, p. 102. Cross-Sound's petition for reconsideration of the ICC decision continued to press for cross-examination and attacked the 600,000 gallon estimate as a "childlessly simplistic" calculation which would not have

survived an oral hearing. The initial source of this figure which assumed crucial significance, was applicant's president whose self-serving assertions were accepted by the Division without affording petitioner and intervenors in support the opportunity to cross-examine on the one factor which the Division found outweighed all other adverse environmental consequences.

Mascony argues Cross-Sound was properly denied cross-examination on the EIS since preparation of the statement was not required in view of the ultimate finding that the case was not "a major federal action significantly affecting the quality of the human environment." (Mascony Brief, pp. 26-27). Put differently, this argument means cross-examination on an EIS hinges on whether the action is major which, in turn, hinges on whether there is an EIS.

Whether it had to or not, the ICC ordered an EIS and relied on it extensively in reaching findings on crucial environmental issues. The decision admits that the EIS raised "serious questions" as to the effect on the environment. It purported to balance positive versus detrimental impacts and concluded that the proposal would not have such a deleterious impact as to warrant denial of the application.

Since the environmental impact statement was treated as evidence and was placed in the record along with other evidence, the statement should have been subject to cross-examination.*/

The dissenting Commissioner concluded that the EIS clearly showed this case to be a "major federal action" affecting the environment and that even a limited grant of authority "will clearly result in radical and major changes in the environment at several points." J.A. Doc. 324, p. 76. He considered the environmental issues "largely unresolved".

Both ICC and Mascony strain to excuse the clear-cut violation of the Commission's own regulations in effect at the time of the November, 1976 decision.**/ Those regulations afford any party, such as Cross-Sound and other protestants in this proceeding, the right to cross-examine "...witnesses of both the Environmental Affairs Staff...and the applicant or others...". 49 C.F.R. §1108.17(b). Section 1108.3(e) of those regulations provides that

*/ Mascony's assertion at page 29 of its brief that no party sought cross-examination of ICC staff or others on the EIS is incorrect. Petitioners and other protestants in their petitions for reconsideration of the ICC decision objected vigorously to lack of cross-examination. See J.A. Docs. 339, 345.

**/ The law is clear that an agency may not lawfully act contrary to its own regulations. Service v. Dulles, 354 U.S. 363, 372-373 (1957).

proceedings "in progress" on the effective date of the regulations were to be governed "to the fullest extent practicable" by the procedures required by the rules. The ICC has offered no specific reason why a hearing on the final EIS was not practicable. In view of the extensive delays permeating the entire proceeding, a hearing for cross-examination could have and should have been held before the Division relied upon the final EIS in disposing of the important environmental issues. Approximately five months expired between service of the final EIS in June, 1976, and the November, 1976 decision. This was more than ample time in which to convene and conclude a hearing on the environmental issues.

To describe this case as a "bridge" case requiring use of procedures for "practical accommodation of completed staff work and evolving environmental considerations" is to indulge purely in semantical gymnastics. (ICC brief, p. 17.) The fact is the rules requiring that Cross-Sound and others be afforded a hearing and cross-examination were solidly in effect in the summer of 1976, five months prior to the November 1976 decision which relied upon the EIS.* /

* / The new rules were adopted in Ex Parte 55 by order of June 9, 1976, effective upon publication in the Federal Register. That occurred July 7, 1976. 49 F.R. 27838. The final EIS was served June 11.

While it was not possible to apply the new rules retroactively to the time of the original hearing (when an ICC environmental statement should have been prepared and made available), the ICC had ample opportunity to convene an oral hearing prior to receiving the EIS in the record.

ICC counsel suggests five arguments in support of denial of cross-examination on crucial environmental issues.^{*/} These were (1) cross-examination was not required since the regulations requiring it in these types of cases were adopted after close of hearings, (2) the regulations require cross-examination only if the draft and final EIS are served prior to hearing, (3) "opportunity for cross-examination" is satisfied by opportunity to challenge an EIS by submission of parties' "own environmental evidence", (4) since NEPA applies to ICC proceedings handled under so-called modified procedure, cross-examination is not necessary here, and, lastly (5) the ICC had discretion to refuse to hold further hearings and did not abuse that discretion. (ICC Brief, pp. 22-29.)

^{*/} As noted supra, the Division balanced detailed environmental considerations in reaching its decision on the application.

These are wholly specious arguments, as demonstrated below:

1. Adoption Of The Rules After Close
Of Hearings.

As earlier stressed, the rules were in effect five months prior to the November decision which received the final EIS as evidence in the record and balanced environmental impacts based on findings in the EIS. The clear thrust of the Commission's revised environmental rules is to require that the EIS be part of the record and that cross-examination be afforded on the statement in adjudicatory proceedings. Otherwise, affected parties would, as here, be denied fundamental protections of the Administrative Procedure Act. Ex Parte 55 (Sub 4), Revised Guidelines For The Implementation Of The National Environmental Policy Act Of 1969, 352 I.C.C. 451, 460 (1976).

2. No Service Of EIS Prior To
Hearing.

The short answer to this is that the rule relied upon, 49 C.F.R. §1108.17(a), does not limit cross-examination. Furthermore, 49 C.F.R. §1108.16(b) expressly provides in oral hearing cases for distribution of the final EIS 15 days "prior to that portion of the oral hearing relating to the impact statement."

3. Cross-Examination Is Satisfied By
Submission Of Environmental Evidence
By Affected Parties.

This argument is so preposterous as to hardly warrant comment. The rules afford any party the right to offer probative evidence and cross-examine. 49 C.F.R. §1108.17(b).

4. Cross-Examination Not Necessary
Because NEPA Applies To Proceedings Handled
Under Modified Procedure.

NEPA's application to non-hearing modified procedure cases^{*/} certainly does not eliminate the right of cross-examination in this case. Moreover, rules applicable to modified procedure provide, as they must, for oral cross-examination where "material facts are in dispute." 49 C.F.R. §1100.51(a).

5. The ICC Has Discretion To Deny Cross-
Examination And Did Not Abuse That
Discretion.

The expressed intent of the ICC in adopting its revised rules under NEPA was to afford parties to adjudication proceedings involving a hearing record the opportunity for cross-examination on the final EIS if the EIS is part of the record. 352 I.C.C. at 456, 459-460. 49 C.F.R. §1108.16-17.

Environmental issues were present in this case from

^{*/} Under modified procedure, both applicant and protestant submit their case-in-brief and rebuttal case in the form of written verified statements. See, 49 C.F.R. §1100.43, et seq.

its outset. Serious questions had been raised by Cross-Sound, Greenport, and other protestants as to the accuracy and completeness of information used in preparation of the EIS. Division 1 specifically evaluated, and made findings on, environmental impact in deciding to grant the application. Clearly, affected parties should not have been denied cross-examination. The result was a record not capable of withstanding judicial scrutiny.

Refusal by the Division to allow oral cross-examination on the EIS was reversible error since under the circumstances of this case the Division violated Commission rules and abrogated rights of affected parties contrary to the Administrative Procedure Act.

- C. The ICC Could Not Lawfully Grant Authority To Mascony In The Absence of Evidence And Subsidiary Findings In Support Of A Statutorily Required Determination That Mascony Is Fit, Willing And Able To Perform The Proposed Service.

The ICC seriously mischaracterizes Cross-Sound's position regarding the fitness and ability requirements of section 309(c). (ICC Brief, pp. 34-36.) According to the ICC, Cross-Sound contends that no grant of authority can be made to Mascony since it is not able "immediately" to commence service. That is not Cross-Sound's contention.

Cross-Sound does not claim that the inability of Mascony to commence operations "immediately" is a defect in the ICC's action herein. Rather, the defect is far more fundamental. Section 309(c) requires that an applicant affirmatively establish that it "...is fit, willing and able properly to perform the service proposed..." It is established beyond serious question that applicant has the affirmative burden of making that showing. Kroblin Refrigerated Express, Inc. v. United States, 197 F. Supp. 39, 47 (1961). Mascony failed to satisfy that burden.

Notwithstanding extraordinary opportunities to do so, Mascony has never been able to place before the Commission for its consideration a feasible, workable, realistic plan of operation. That is the deficiency that Cross-Sound alleges. It has nothing to do with any question of whether Mascony can commence operations immediately or whether it still needs any local approvals before it can lawfully begin to operate. Instead, it relates to a basic failure by Mascony to ever submit a plan of operation which would support a statutorily required finding of fitness and ability.*/

*/ As petitioners pointed out in their opening brief, operational feasibility is well recognized as an essential prerequisite to a fitness finding. The ICC does not take issue with that contention in its brief.

The judge who presided over the reception of evidence recognized this failure and properly concluded that the application must therefore be denied. The ICC itself recognized that failure as late as April 8, 1977 since that is the only plausible explanation for its reopening of the record to give Mascony still another opportunity to prove what it should have been able to prove three years earlier.

In response to that final opportunity to satisfy its statutory burden Mascony not only failed to do so but, in fact, provided further compelling support to the conclusion that it simply lacks the capacity to do so.

Among the more significant details of the most recent plan of operation was a proposed traffic pattern that would require vehicles to run through a motel structure which Mascony has no authority to alter (J.A. Doc. 361). Similarly, as was explained by the Chairman of the Village of Greenport Planning Board, the proposed traffic pattern would require cars and trucks in large numbers to run over shallowly buried fuel storage tanks which could not withstand the resulting vibration. Because of their location, their rupture would result in gasoline circulating through the harbor area in large quantities. The Planning Board Chairman went on to conclude that:

"A cigarette thrown by a tourist into the waters could cause a conflagration along the old wooden waterfront, the likes of which Greenport has never seen." (J.A. Doc. 362)

These are but two of the major flaws in Mascony's plan of operation that were simply ignored by the ICC.*

The ICC attempts to excuse the absence of a satisfactory basis for a proper finding of fitness by emphasizing that it has granted only a conditional grant of authority. Such a grant does not excuse that statutory requirement for a finding of fitness.

As the ICC notes at page 34 of its brief section 309(c) does require a showing that a proposed service "...is or will be required by the present or future public convenience and necessity." Significantly it does not provide for a showing that the applicant is or will be fit, willing or

*/ While the ICC did make a finding of fitness in terms of the statutory language, that finding is meaningless in the absence of subsidiary findings explaining how the Commission could possibly have reached such a conclusion in the face of uncontroverted facts demonstrating that applicant's plan of operation is totally unrealistic. See, for example, State Of Florida v. United States, 282 U.S. 194, 215; United States v. Baltimore & Ohio R. Co., 293 U.S. 454, 464; United States v. Chicago, M. St. P. & P. R. Co., 294 U.S. 499, 504, 505, 510, 511; United States v. Carolina Freight Couriers Corp., 315 U.S. 475, 488, 489. Illustrative of this basic defect is the fact that the only finding by the ICC with respect to the highly controversial and continually changing plan of operation at New London was that: "In New London, applicant has made arrangements for a docking facility". J.A. Doc. 324, p. 65.

able to provide that service. Rather the Congressionally mandated test is a showing that the applicant is fit, willing, and able.

Thus the cases cited by the ICC in its brief on p.34^{*/} as authority for its departure from its unequivocal mandate are inapposite. In those cases there was no serious question as to whether the applicants could perform. Rather, they were cases in which the applicants had obtained authority by promising to provide a service superior to that of existing carriers. The Commission issued term certificates as a device for insuring that the applicants would fulfill their promises rather than as a means for allowing them to demonstrate that they could.

The situation is even more egregious with respect to Mascony's proposed operation at New London. The third version of Mascony's New London docking plan, unveiled for the first time on April 26, 1977^{**/} provides for an extremely hazardous operation over the railroad tracks which run

^{*/} American Delivery Systems, Inc.--Freight Forwarder Application, 346 I.C.C. 465 (1974); Watkins Motor Lines, Inc., Ext.--General Commodities, 114 M.C.C. 562 (1972); Allied Delivery System, Inc. Ext.-Michigan, 120 M.C.C. 110 (1974).

^{**/} This operating evidence, untested by cross-examination, was submitted by Mascony in response to the second order on reopening, served April 8, 1977. J.A. Doc. 356.

directly across the front of its proposed landing site. The ICC not only ignored its responsibility with respect to safety considerations but deliberately refused to receive meaningful evidence relevant to that issue.

While the DOT rather than the ICC has direct responsibility for transportation safety matters, the ICC does have a responsibility to authorize operations only after assuring itself that they will comply with DOT safety standards. ICC recognized this responsibility as recently as November 11, 1977, in Docket No. 36307, Radioactive Materials, Missouri-Kansas-Texas R.R. In that decision the ICC acknowledged its relationship to DOT was analogous to that of CAB. The ICC cited the following quotation from Delta Air Lines, Inc. v. C.A.B., 543 F. 2d 247, 260 (D.C. Cir. 1976) as being illustrative of that relationship:

"The [Civil Aeronautics Board] fulfills its responsibility with respect to safety questions when it determines that all FAA/DOT safety requirements have been satisfied... [I]n general we believe that the Board should defer to the safety expertise of its sister agencies and accept the FAA/DOT position on safety as establishing both an inner and outer limit on its safety jurisdiction."

Here the ICC deliberately refused even to consider much less accede to the "DOT position on safety" in making its evaluation of the feasibility of applicant's proposed plan of operation.

D. Other Matters.

The ICC in its brief attempts to lay an elaborate smoke-screen over its illegal action by citing nearly a score of cases for the proposition that the issuance of operating authority is a matter entrusted to the discretion of the ICC and that the substantive determination of public convenience and necessity was properly made. This argument ignores the issues in this case. Petitioner and its supporting intervenors recognize that the ICC is vested with discretion, though not unbridled, to evaluate and draw conclusions from facts of record. However, in compiling the record, and reaching a decision, it must conduct itself in a manner which is fair to all concerned. This has not been done in this case.

A gratuitous comment in footnote 4 on page 7 of Mascony's brief alleges that "the McAllister family continues to control the existing Long Island Sound ferry operations" presumably including Cross-Sound. This is utterly baseless. No member of the McAllister family controls Cross-Sound. If Mascony believes that any unlawful control exists under section 5 of the Act, 49 U.S.C. §5, it has never seen fit to put such a belief to the test by filing a complaint with the ICC so alleging. Moreover, there is absolutely no basis for

that conclusion in the record herein. Similarly, Mascony's statement at page 51 of its brief that "Cross-Sound's ferry service also can only be reached at New London by a grade crossing over Amtrak's right of way" is not only without record support but is also patently false. Such misrepresentations are instructive, however, in illustrating the full measure of prejudice to Cross-Sound and others that resulted from the ICC's admission and consideration of evidence tendered by applicant without the opportunity to test it under cross-examination.

WHEREFORE, petitioner and supporting intervenors respectfully request that the Court set aside the decision of the Interstate Commerce Commission, Division 1, and grant such other and further relief as it considers appropriate in the premises.

Respectfully submitted,

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Dated: December 3, 1977

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CROSS-SOUND FERRY SERVICES, INC.,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 77-4162
	)	
THE UNITED STATES OF AMERICA and	)	
INTERSTATE COMMERCE COMMISSION,	)	
	)	
Respondents.	)	

CERTIFICATE OF SERVICE

I hereby certify that I have this 3rd day of December, 1977, served a copy of the Reply Brief of Petitioner and its Supporting Intervenors herein either by hand delivery or by first class mail, postage prepaid, upon the following:

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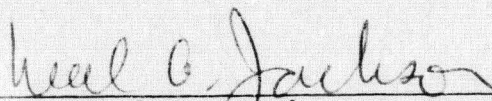
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